

**January 31, 2008**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

**Motion for Reconsideration**

Name of Petitioner: Citizen Action New Mexico

Date of Filing: July 16, 2007

Case Number: TFA-0215

This Decision concerns a Motion for Reconsideration that was filed by Citizen Action New Mexico (hereinafter referred to as "CANM" or "the Movant"). In its Motion, CANM requests that we modify a Decision and Order that we issued in response to a Freedom of Information Act (FOIA) Appeal filed by CANM. *See Citizen Action New Mexico*, Case No. TFA-0203 (July 6, 2007) (*Citizen Action*).

**I. BACKGROUND**

The FOIA generally requires that documents held by federal agencies be released to the public on request. In its FOIA request, CANM sought access to: the "site-wide ground water surveillance monitoring plan prepared by Sandia National Laboratories, New Mexico (SNL)," the status report concerning this plan that was required by DOE Order 450.1, "all attachments, maps, graphs and references used in conjunction with both the monitoring plan and the status report," any document that was provided to the New Mexico Environment Department pursuant to the DOE Order, and documents showing the funding mechanisms for the surveillance monitoring plan. CANM Appeal at 1.

Upon receipt of this request, the Department of Energy's (DOE) National Nuclear Security Administration Albuquerque Service Center (NNSA) referred it to SNL, which conducted a search and identified two responsive documents. The first was identified as SNL "Environmental Monitoring and Surveillance Plan (PG470247), Undated, 29 pages," and the second as SNL "Groundwater Protection Program Plan for Fiscal Year 2007 (PG470234), dated September 2006, 32 pages." Both of these documents were determined to be responsive to that part of the request concerning the "site-wide ground water surveillance monitoring plan," and both were released to CANM in their entirety. NNSA inquired of SNL as to why no documents responsive to the other portions of CANM's request could be located. *See* April 4, 2007, letter from Carolyn Becknell, NNSA FOIA Officer, to David McCoy, Director, CANM (Determination Letter) at 1. SNL replied that the other documents requested by CANM do not exist because DOE Order 450.1 does not require them. Specifically, SNL draws a distinction between the "site-wide ground water surveillance

monitoring plan” that the Movant contends is required by the Order, and the terms of the “Contractor Requirements Document (CRD),” which sets forth the requirements of the Order that apply to contractors. The CRD states, in pertinent part, that contractors must “[c]onsider . . . for inclusion as applicable” into their Integrated Safety Management Systems “implementation of a site-wide approach for groundwater protection.” DOE Order 450.1, Appendix 2 at 1-2. SNL contends that the Order does not require the creation of the “site-wide groundwater surveillance monitoring plan” requested by CANM, and that the “Groundwater Protection Program Plan for Fiscal Year 2007” that was provided to the Movant details the implementation of a site-wide approach for groundwater protection, and therefore satisfies the requirements of the CRD. *See* November 21, 2007, e-mail from Shirley Peterson, NNSA, to Robert Palmer and William Schwartz, Office of Hearings and Appeals. With regard to the remainder of CANM’s request, SNL replied that the only “status report” referred to in DOE Order 450.1 would be an internal DOE document, that there were no documents provided to the New Mexico Environmental Department pursuant to the provisions of the Order, and that since there was no “site-wide groundwater surveillance monitoring plan,” and no status report in its possession, it also had no “attachments, maps, graphs and references” to or in these documents, and no funding mechanisms for such a plan. Determination Letter at 2.

CANM appealed this Determination. In its Appeal, the Movant contended that NNSA’s search for responsive documents was inadequate, that the Determination Letter was untimely, and that the documents that CANM received “were insufficiently identified as to demonstrate the necessary compliance with DOE Order 450.1.” Appeal at 1. In our Decision, we concluded that NNSA’s search for responsive documents was adequate and that we did not have jurisdiction to address CANM’s contention that NNSA did not issue its Determination in a timely fashion. We further rejected the Movant’s contention that the documents received were insufficiently identified. *See Citizen Action*.

In its Motion for Reconsideration, CANM states that “[u]pon information and belief,” a written status report was filed concerning the environmental protection program at Los Alamos National Laboratories (LANL) “to comply with DOE O 450.1 by December 31, 2005 as part of implementing DOE 450.1.” Motion for Reconsideration at 1. Accordingly, CANM argues that a similar report should exist concerning SNL, and requests that we inquire of SNL as to whether a written status report exists or whether a written memorialization of an oral status report exists. Motion at 1-2, 4. CANM further contends that it should have been provided with two communications cited in our Decision, a May 9, 2007, letter from Juanita Evans, SNL, to Andrea Leal, DOE Sandia Site Office and a May 17, 2007, memorandum from Ms. Leal to Carolyn Becknell, NNSA FOIA Officer, and should have been given an opportunity to comment on those documents before the issuance of our Decision in *Citizen Action*. The Movant requests access to these communications. \*

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\*/ CANM also points out that our Decision did not address NNSA’s failure to provide “documents which show the funding mechanisms for the surveillance monitoring plan on an annual basis as specific budgetary items.” Motion at 4. As set forth above, NNSA stated in its Determination that “since there is no ‘site-wide monitoring plan,’ there is no funding mechanism for the plan.” Determination Letter at 2. In previous cases, we have applied a standard of reasonableness in evaluating FOIA searches, and have not required that those searches result in absolute exhaustion of the files. *See, e.g., Stephen A. Jarvis*, Case No. VFA-0764, October 23, 2002. Given NNSA’s statement that there is no “site-wide monitoring plan,” it was reasonable for it to conclude that there are no documents concerning a funding mechanism for such a plan.

## II. ANALYSIS

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have exercised our discretion to consider Motions for Reconsideration where circumstances warrant. *Nathaniel Hendricks*, 25 DOE ¶ 80,173 (1996). In the past, we have looked to the standards contained in OHA's procedural regulations for guidance as to the appropriate substantive standards for use in this type of case. *See, e.g., Nevada Desert Experience*, 28 DOE ¶ 80,184 (August 28, 2001) (Case No. VFA-0688). Those regulations indicate that a Motion for Reconsideration should be granted only upon a showing of "significantly changed circumstances." 10 C.F.R. § 1003.55. "Significantly changed circumstances" include the discovery of material facts that were not known at the time of the initial proceeding. 10 C.F.R. § 1003.55(b)(2)(i). In this case, CANM states that a status report was prepared concerning DOE facilities operated by a similarly-situated DOE contractor, LANL. When coupled with the requirement in DOE Order 450.1 that DOE Site Office Managers file a status report concerning the compliance of site contractors with the Order by December 31, 2005, DOE Order 450.1(5)(d)(1), this led us to believe that such a report may exist, and justifies reconsideration of our Decision in *Citizen Action*.

Accordingly, we contacted NNSA and inquired as to whether an oral status report had been given by the Sandia Office Site Manager to the "Cognizant Secretarial Officer," as that term is used in the Order, and if so, whether a written memorialization of that report existed. Our inquiry apparently triggered another search, and a document that appears to be the status report requested by CANM was identified. The document is a December 22, 2005, memorandum from Patty Wagner, Sandia Site Office Manager, to Thomas D'Agostino, Deputy Administrator for Defense Programs. *See* November 21, 2007, e-mail from Shirley Peterson, NNSA, to Robert Palmer, OHA Staff Attorney, and William Schwartz, OHA Senior FOIA Official, forwarding the November 19, 2007, e-mail from Ms. Leal to Ms. Becknell. We will direct that NNSA review this document as expeditiously as possible for potential release to CANM.

In the November 19<sup>th</sup> e-mail, Ms. Leal also states that SNL "provided a disk that had the backup information as mentioned in" the Wagner memorandum. This information would appear to be responsive to CANM's request for "maps, graphs and references used in conjunction with . . . the status report," and we will also instruct NNSA to review this material for potential release to the Movant.

The Movant's final contentions concern the May 9, 2007, Evans letter and the May 17, 2007, Leal memorandum that were referenced in our Decision in *Citizen Action*. Specifically, CANM argues that it should have been provided with these communications and with an opportunity to comment on them prior to the issuance of our Decision. CANM also requests copies of these documents. As an initial matter, we note that unlike other areas of our jurisdiction (*i.e.*, personnel security and "whistleblower" proceedings, which are quasi-judicial in nature), there are no provisions in the FOIA regulations prohibiting *ex parte* contacts. *See, e.g., City of Federal Way*, 27 DOE ¶ 80,191 (March 10, 1999) (Case No. VFA-0472). Moreover, allowing FOIA appellants to comment on every communication that we receive would make it exceedingly difficult in many cases to process FOIA appeals within 20 working days, as required by Section 1004.8(d) of the FOIA regulations. We therefore reject the Movant's argument that it should have been provided with copies of these documents and an opportunity to respond to them prior to our Decision in *Citizen Action*. In addition, in previous cases we have not permitted FOIA appellants to broaden their document requests in the context of an appeal. *See, e.g., Cox Newspapers*, 22 DOE ¶ 80,106 (February 10, 1992) (Case No. LFA-0180) ; *Bernard Hanft*, 21 DOE ¶ 80,134 (June 20, 1991) (Case No. LFA-0126). CANM has not persuaded us to depart from this policy. Accordingly, the Movant should file another FOIA request if it wishes to have the DOE review and consider releasing these documents.

It Is Therefore Ordered That:

- (1) The Motion for Reconsideration filed by Citizen Action New Mexico, OHA Case Number TFA-0215, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.
- (2) This matter is hereby remanded to the National Nuclear Security Administration's Albuquerque Service Center. On remand, NNSA should review the December 22, 2005, memorandum from Patty Wagner, Sandia Site Office Manager, to Thomas D'Agostino, Deputy Administrator for Defense Programs, and the supporting documentation provided by SNL as expeditiously as possible and issue a new determination releasing the documents or justifying the withholding of any portions of them.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: January 31, 2008